P & A SYSTECH SDN BHD

v.

YAB DATO' SERI MAHDZIR KHALID, MENTERI BESAR KEDAH DARUL AMAN & ANOR

HIGH COURT MALAYA, ALOR SETAR
SEE MEE CHUN JC
[CIVIL SUIT NO: 21-08-2007]
23 NOVEMBER 2010

TORT: *Defamation - Defamatory statements - Defence - Justification - Whether needed to be specifically pleaded - Plea that "words complained of were true in substance and in fact" - Whether amounted to plea of justification - Suit against State Government - Vicarious liability - Maker of statements not cited as co-defendant - Whether State Government not capable of alleged defamation*

In this case, one Syarikat Shahidin had been appointed by the Ministry of Defence to collect and retrieve spent ammunition shells which the military aircrafts had used for their exercises at an island known as Pulau Songsong, Kedah ('the work'). Subsequently, by an agreement dated 9 June 2005, Syarikat Shahidin sub-contracted the work to the plaintiff. Controversies arose as to the conduct of the plaintiff in performing the work, following which allegations were made by a State Executive Councillor ('Datuk Nawawi') and the Menteri Besar of Kedah ('Dato' Mahdzir') that the plaintiff had used the contract as a facade to illegally carry out sand dredging activities in the area. More specifically, the allegations, which were published in the print and electronic media, imputed that the plaintiff had not only retrieved spent shells that had fallen into the sea but had dredged out and sold sands in the area, that the plaintiff had never been given permission by the State Government to dredge out sands in the area, and that the activities as carried out by the plaintiff were illegal. It was not in dispute that prior to or while undertaking the work, the plaintiff had executed an agreement with one Marinecore Sdn Bhd in which the plaintiff agreed to supply marine sands to the latter. That notwithstanding, the plaintiff averred that the statements as made by Datuk Nawawi and Dato' Mahdzir had defamed them, and in the circumstances filed a suit against Dato' Mahdzir and the Government of the State of Kedah claiming various damages

A and relief (Datuk Nawawi, however, was not cited as a defendant). The defendants, who did not specifically plead justification, sought nonetheless to rely on such defence, arguing that the plea "the words complained of were true in substance and in fact" in their amended statement of defence were more B than sufficient to constitute a plea of justification. The primary issues that arose were: (i) whether the impugned statements were defamatory of the plaintiff; (ii) whether the second defendant State Government could be held liable for the statements made by Datuk Nawawi; and (iii) whether the defendants could rely on the C defence of justification, and if so, whether such defence ought to succeed on the facts and in the circumstances of the case.

Held (dismissing claim):

D **(1)** Datuk Nawawi as the maker of the impugned statements ought to have been sued as a defendant. As Datuk Nawawi was not joined as a defendant in this action for the statements attributed to him, the State Government could not be capable of the alleged defamation. (paras 3-6)

E **(2)** The word "illegal" used to describe the sand dredging activities, as well as the phrases "tidak pernah memberikan kebenaran kepada syarikat itu untuk menyedut pasir" and "mereka bukan sahaja mengeluarkan kelongsong peluru yang jatuh ke dalam laut tetapi turut menyedut dan menjual pasir F sekitar pulau tersebut" did in law amount to defamation. (para 14)

(3) Although the defendants had not pleaded justification, the defendants did state that approval was only for the removal G of ammunition and not for sand dredging. This in fact constituted the defence of justification, although not specifically stated. It must be so as, if the defendants could prove so, it would mean that the three statements in question were substantially true. Further, by para 12 of their statement H of defence, the defendants had stated that the statements made were true. The defendants could therefore rely on the defence of justification. (paras 16-18)

(4) The inference to be drawn is that the plaintiff was on the I island for the specified purpose of removal of waste materials. The further inference is that it was dredging sand as well as

removing ammunition shells. That this is so is evident from the agreement that the plaintiff had entered with Marinecore. It was stated in the recital thereof that the plaintiff had been given the right to extract sand or in the possession of a sand source area located at Pulau Songsong, thereby showing that the plaintiff needed sand for the purpose of supplying to Marinecore, and was probably already dredging sand. This being the case, the defendants had proven their statements were true and had, consequently, established justification. (paras 28 & 29)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Chok Foo Chow v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***

Other source(s) referred to:

Gatley on Libel and Slander, 9th edn 1998, pp 7, 173, 233

For the plaintiff - Md Radzi Mustafa; M/s Radzi & Abdullah

For the defendant - Anas Ahmad Zakie (Zahruddin Mohammed Isa with him); State Legal Advisor

Reported by Wan Sharif Wan Ahmad

JUDGMENT

See Mee Chun JC:

[1] The plaintiff is suing the defendants for defamation as a result of statements made by the defendants published in newspapers and the Internet in mid February 2007 and early March 2007. The plaintiff is a company. The first defendant was the then Menteri Besar Kedah Darul Aman while the second defendant is the State Government Kedah Darul Aman.

Alleged Defamatory Statements

[2] The alleged defamatory statements are as set out in paras 5-12 of the statement of claim. Altogether there are eight statements which appeared in Berita Harian C6 (16-2-2007,P17), Sunday

A Star N25 and Star Online (18-2-2007, P18 and P19), Utusan Malaysia Online (28-2-2007, P20), Harian Metro (9-3-2007, P21), Berita Harian Online (21-2-2007, P22), Star N15 (22-2-2007, P23) and Star Online (9.3.2007, P24) (all collectively referred to as the statements). The Utusan Malaysia statement dated
B 14 March 2007 referred to in para. 1(e) of Issues to be tried (bundle E) was not pleaded.

Statements Of Datuk Nawawi Ahmad

C **[3]** Three statements in Star (22-2-2007, P23), Star Online (9-3-2007, P24) and Harian Metro (9-3-2007, P21) were made by Datuk Nawawi Ahmad (State Environment Committee Chairman) who has not been sued as a defendant. This obvious fact was agreed by plaintiff witness 1 (PW1 Puan Laili bt Ng Mohd Ismail, Managing Director, plaintiff company).
D

[4] *Gatley on Libel and Slander*, 9th edn 1998 states at p. 173:

> An action for defamation is a purely personal action. The proper person to sue as plaintiff is the person defamed, and the proper
E person to be sued as defendant is the person who published the defamatory words … .

[5] This means that Datuk Nawawi as the maker of the statements ought to have been sued as defendant. The State Government cannot be liable for those statements. *Kerajaan*
F *Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 is resoundingly clear on this when at p. 678 the Federal Court said-

> In the present case, all the eight causes of actions are actions in tort or tort based premised on the act or omission of an individual. None of the Governments sued is capable of
G committing the wrong pleaded. Since the Governments' liability in tort can only be vicarious by virtue of ss 5 and 6 of Act 359 and as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is therefore not possible to maintain a successful claim in tort against
H the government as primary tortfeasors.

[6] As Datuk Nawawi was not joined as defendant in this action for the statements attributed to him and the State Government is not capable of the alleged defamation there is no case as far as
I those three statements are concerned.

Statements By Dato' Seri Mahdzir Khalid

[7] Turning now to the remaining five statements they were made by Dato Seri Mahdzir Khalid. Out of these five statements one statement (P22-Berita Harian Online 21-2-2007) was admitted by PW1 herself in cross examination to be not defamatory. Refer to p. 14 of Court Recording Transcription System:

> S: P22. Baca keratan surat khabar ini, muka surat 27 dan 28. Saya cadangkan Puan Laili, tidak ada apa-apa fitnah yang dikeluarkan melalui keterangan kenyataan yang dibuat. Setuju ataupun tidak setuju?
>
> J: Yang ini saya setuju.

[8] She was not re examined on her admission and as such I would have to accept her evidence as an admission of no defamation. The Court of Appeal case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639 at p. 658 had this to say:

> ... It is essential that a party's case be expressly put to his opponent's material witness when they are under cross examination. A failure in this respect may be treated as an abandonment of the pleaded case ...It is quite wrong to think that this rule is confined to the trial of criminal cases. It applies with equal force in the trial of civil cases.

If plaintiff's own witness says there is no defamation there is no person defamed and hence no case to speak of.

[9] P17 (Berita Harian C6 16-2-2007) is the newspaper version of what appeared online in P22 which is admitted to be non defamatory. Hence there is no defamation.

[10] That only leaves three more statements to be considered. They are reproduced as follows:

> Sunday Star (18-2-2007, P18) and Star Online (18-2-2007, P19)
>
> Kedah Menteri Besar Dato' Seri Mahdzir Khalid confirmed that the dredging activities in Pulau Songsong and its vicinity was illegal.
>
> Utusan Malaysia Online (28-2-2007, P20)
>
> Kedah arah henti kegiatan curi pasir

A Kerajaan Negeri hari ini mengarahkan sebuah syarikat yang menjalankan operasi mengambil kelongsong peluru di Pulau Songsong Yan dekat di sini menghentikan serta merta aktiviti itu.

Menteri Besar Dato' Seri Mahdzir Khalid berkata arahan itu dikeluarkan kerana perjanjian antara syarikat terbabit P&A Systech B Sdn Bhd dengan Kementerian Pertahanan sebelum ini menimbulkan kekeliruan dari segi pengambilan kelongsong peluru dan pengambilan pasir.

Mengikut kelulusan Kementerian Pertahanan katanya syarikat itu C dibenarkan mengambil kelongsong peluru yang telah digunakan oleh pesawat tentera semasa mengadakan latihan di sekitar pulau berkenaan.

"Masalahnya mereka bukan sahaja mengeluarkan kelongsong peluru yang jatuh kedalam laut tetapi turut menyedut dan menjual D pasir sekitar pulau berkenaan. Perjanjian itu nampak sangat mengelirukan.

Menurut beliau kerajaan negeri tidak pernah memberikan kebenaran kepada syarikat itu untuk menyedut pasir di kawasan pulau berkenaan.

E These statements will collectively be referred to as the three statements.

Whether The Three Statements Defamatory

F **[11]** As to what constitutes defamation I can do no better than to refer to *Gatley (supra)* at p. 7:

> **What is defamatory.** There is no wholly satisfactory definition of a defamatory imputation. Three formulae have been particularly G influential: (1) Would the imputation tend to "lower the plaintiff in the estimation of right-thinking members of society generally"?; (2) Would the imputation tend to cause others to shun or avoid the plaintiff?; and (3) Would the words tend to expose the plaintiff to "hatred, contempt or ridicule"?

H **[12]** Hence in the Court of Appeal case of *Chok Foo Chow v. The China Press Bhd* [1999] 1 CLJ 461 the court said at p. 467:

> … the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives I or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[13] The plaintiff says that the statements meant and were understood to mean that the plaintiff was a jahat company carrying on sand dredging activities at Pulau Songsong illegally and without authorization. Plaintiff goes on to say the statements are defamatory and have caused a great loss of credibility and reputation to it as a legitimate company and business entity (menyebabkan plaintif sangat cacat kebolehpercayaan dan reputasinya sebagai sebuah syarikat dan entiti perniagaan yang berwibawa). The statements also lowered plaintiff in the estimation of the public and business community.

[14] The approach taken is to examine the words complained of in the context of the whole article. The word "illegal" to describe the sand dredging activities in the Star and Star Online and "tidak pernah memberikan kebenaran kepada syarikat itu untuk menyedut pasir" in Utusan Malaysia Online in reference to plaintiff impute a lack of integrity in that plaintiff was conducting its activities in disregard of the law. The statement "mereka bukan sahaja mengeluarkan kelongsong peluru yang jatuh kedalam laut tetapi turut menyedut dan menjual pasir sekitar pulau berkenaan" impute plaintiff to be stealing sand and hence lacking integrity and honour. I find the three statements amount to defamation.

Defence

[15] *Gatley (supra)* says at p. 233 that:

> It is a defence for the defendant to establish that the imputation in respect of which he is sued is substantially true and the defence is called a plea of justification.

[16] The plaintiff's counsel has submitted that although the defendants have denied the claim nowhere is the defence of justification in respect of the defamatory statements pleaded. As parties are bound by their pleadings it is submitted that the defendants can only rely on the absence of a contract between the plaintiff and the Ministry of Defence and the absence of approval to enter the waters of Pulau Songsong. I would add that the defendants have also stated approval was only for removal of ammunition shells but not for sand dredging.

[17] This in fact is the defence of justification although not specifically stated. This is because if defendants can prove so it would mean the three statements are substantially true and that is the essence of justification.

[18] Further in para. 12 of its statement of defence defendants have stated the statements made are true. In *S. Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 the then Supreme Court remarked at p. 240:

> In the amended statement of defence it was averred that the words complained of were true in substance and in fact. In other words, the appellant pleaded justification.

Defendants can thus rely on justification as their defence.

Whether Justification Proved

[19] The burden lies upon defendants to establish justification. To establish justification defendants must prove that the defamatory imputation is true. Refer to *Pakianathan (supra)* at p. 240-241.

[20] Syarikat Shahidin (Shahidin) had obtained a contract "memungut dan membeli kelongsong serta peluru yang telah digunakan dari jenis tembaga, steel dan alloy di persekitaran Pulau Songsong (P2). The contract dated 26 February 2004 was valid for two years from the date of signature. It was extended from 26 February 2006 to 25 February 2007 (P5). The contract with the Government was executed and implemented through Ministry of Defence (Mindef).

[21] Shahidin in turn entered into a project management agreement (PMA) with plaintiff dated 9 June 2005 (P4). Plaintiff as the project management company was to recover the items as described in the vicinity of Pulau Songsong. Clause 5.1 stated that the PMA shall expire on 25 February 2006 and Shahidin as the contractor "warrants that it shall secure a further extension of two years upon such advice from the project management company". PW1 says although the PMA had expired in February 2006 there was an extension.

[22] Pursuant to the PMA plaintiff entered the waters of Pulau Songsong and commenced works. Plaintiff had obtained the approval from the State *vide* letter dates 28 June 2006 for "pengeluaran sisa-sisa kerja (waste) termasuk pasir, tanah, selut,

batu karang,kulit-kulit siput dan lain-lain di dasar laut Pulau Songsong". This was subject to various conditions. Payment of Lesen Menumpang Sementara were made and the licences were issued. The air force through its Operations Department and Procurement of Materials Section had no objection to the pengeluaran sisa-sisa *vide* letters dated 18 January 2007 and 19 January 2007.

[23] Defendant witness 3 (DW3 – Azizah bt Mohd Khalid, Mindef) was attached to Cawangan Aset since January 2005. Disposal of ammunition shells comes within her portfolio. It was her evidence that Shahidin had by letter dated 19 July 2005 (D32) applied for the registration of plaintiff as project management group and that Mindef had by reply dated 22 July 2005 (D33) deferred the application pending clarification on certain issues. According to DW3 Mindef had never approved plaintiff to do the works nor had it withdrawn the deferment. It is also her evidence that all contracts under Mindef come within the purview of the Finance Division.

[24] First defendant gave evidence as defendant witness 4 (DW4). It is his evidence that the approval of the State was only for disposal of waste materials which are the materials extracted alongside the ammunition shells. At para. 15 of his witness statement (D34) he says:

> 15. S: Apakah hubungkait kenyataan di akhbar dan kebenaran pengeluaran pasir laut ini?
>
> J: Kenyataan saya di akhbar ialah merujuk kepada pengeluaran pasir laut semata-mata. Pasir laut ini tidak dikeluarkan bersekali dengan kelongsong-kelongsong peluru. Maka jika dikeluarkan pasir sahaja, kegiatan ini bertentangan dengan kelulusan yang diberikan oleh Kerajaan Negeri.

[25] On his statement in Utusan Malaysia Online (P20) DW4 was aware that Mindef had only approved the removal of ammunition shells and not sand dredging and he had been informed by the Deputy Secretary General (Operations), Mindef. DW4 was also aware that it was Shahidin and not plaintiff that had the contract for removal of ammunition shells.

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Finding Of Court On Justification

[26] From the evidence it was Shahidin and not plaintiff that had the contract for removal of ammunition shells and the contract expired on 25 February 2007. Whatever plaintiff had was derived
B from the PMA which had not been approved by Mindef. Clause 16.1 of Shahidin's contract with the Government is clear there can be no sub contracting unless with the prior written approval of the Government. Whatever approval given by the State and the various agencies to plaintiff was on the supposition that it had
C such contract and on that basis the approval for pengeluaran sisa-sisa kerja was given. This is evident from the letter written by plaintiff to the then acting Menteri Besar dated 26 November 2005 (P6) informing that it would be starting work on removing ammunition shells and referred to a contract reference number. A
D similar letter to the Land Office Yan dated 8 March 2007 (P7) was also written. Without such contract the approval may not have been forthcoming.

[27] Even if plaintiff had such a contract the PMA expired on
E 25 February 2006. Although Shahidin warranted to secure an extension of two years there was no evidence of such extension. On the assumption that plaintiff had a valid contract the approval given was only for removal of waste materials and not for sand dredging.

F **[28]** The inference to be drawn is that plaintiff was on the island for the specified purpose of removal of waste materials. The further inference is that it was dredging sand as well as removing ammunition shells. This is evident from the Agreement it had entered into on 20 December 2006 with Marinecore Sdn Bhd
G (P25). The scope of work includes the supply by plaintiff of approved marine sand. In the recital it is stated plaintiff claimed it had been given the right to extract sand or in the possession and free of encumbrances a sand source area located at Pulau Songsong. This would mean plaintiff needed sand for the purposes
H of supplying to Marinecore. This makes it probable it was already dredging sand and not PW1's evidence they were only doing a trial run to test equipment.

I

[29] In the light of the above the defendants have proven their statements were true and have established justification.

Defendants Counterclaim

[30] In submission the defendants counsel conceded they had not proven their counterclaim.

Conclusion

[31] Plaintiff's case is dismissed with costs and defendants counterclaim is dismissed.